

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

SEP 10 2002

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Petition of Cox Virginia Telcom, Inc.
Pursuant to Section 252(e)(5) of the
Communications Act for Preemption
of the Jurisdiction of the Virginia State
Corporation Commission Regarding
Interconnection Disputes with
Verizon-Virginia, Inc. and for Arbitration

CC Docket No. 00-249

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SUMMARY

Verizon's Petition for Reconsideration and Clarification should be denied. Verizon has provided no reason to overturn any element of the *Arbitration Order*.

Issue I-4

Verizon asks the Commission to reverse the *Arbitration Order* and allow Verizon to impose a one DS-1 threshold for direct end office trunking. There is no support for this request in the rules or the record of the arbitration hearing.

First, Cox's language does not improperly dictate engineering standards. The parties disagreed only on the threshold for direct trunking, not on the principle, and interconnection agreements routinely address such issues. Second, the threshold for direct trunking affects points of interconnection because it limits where the CLEC can hand off calls, contrary to Section 251(c)(2) and the *Local Competition Order*. Consequently, Verizon's failure to prove that tandem interconnection is technically infeasible is fatal to its position.

The evidence also clearly favors Cox's position. Verizon ignores most of the evidence and never provided any engineering basis for its one DS-1 threshold, while Cox showed that a higher threshold was consistent with current practice. Verizon does not account for other steps it could take to address tandem exhaust. Adopting Verizon's threshold also would discriminate against CLECs because Verizon does not impose the same threshold on other carriers.

Issue I-6

Verizon seeks both "clarification" and reconsideration of this issue. Clarification is unnecessary because there is no conflict between the cases mentioned by Verizon and the *Arbitration Order*. The *Arbitration Order* specifically recognizes the *ISP Traffic Remand Order* and the Cox agreement excludes ISP-bound traffic. The *Mountain Communications* decisions do not concern the classification of traffic for reciprocal compensation purposes, but instead address

arrangements that reduce charges to ILEC end users. In fact, the interconnection arrangements considered in those cases are not used by CLECs.

Reconsideration also is unnecessary. Verizon's legal authority is inapplicable and Verizon's policy arguments have no basis in the record of the proceeding. To the extent the Commission considers state decisions, it should recognize that Verizon ignores decisions that disagree with its position and that, in any event, those cases show that the states are best suited to address NXX assignment issues.

Moreover, the untimely Munsell Declaration does not alter the conclusion that Verizon's proposed language cannot be implemented. The declaration should be given no weight because it is missing key information and has not been subject to either discovery or cross examination. Equally important, the declaration does not address the key flaw in Verizon's position, which is that there is no way to determine the actual originating and terminating points of many calls.

Other Issues

Verizon objects to the portion of Section 4.2.2 that describes how certain interconnection points ("IPs") will be set. The relevant rule does not limit where IPs may be, but merely sets minimum standards, so it does not conflict with Cox's language. Equally important, the agreement already contains language indicating that IPs will be set by "mutual agreement," the relief Verizon seeks, and the parties agreed where those points would be before the arbitration.

Verizon's objection to Section 4.2.3 is that it allows charges for transport between the point of interconnection ("POI") and the IP. This exact provision appeared in both Cox's and Verizon's agreements, so it was negotiated and is not subject to reconsideration. Even if it were not voluntarily negotiated, there would no conflict between this language and the Commission's rules; instead, it covers an issue that the rules do not address.

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OPPOSITION OF COX VIRGINIA TELCOM, INC.

Cox Virginia Telcom, Inc. ("Cox") hereby submits its opposition to the Petition for Reconsideration and Clarification (the "Petition") of Verizon Virginia, Inc. ("Verizon") in the above-referenced proceeding. For the reasons described below, the Commission should deny Verizon's Petition and affirm the determinations made in the *Arbitration Order*.¹

I. Introduction

The Petition continues Verizon's pattern of misdirection and flummery. As before, Verizon seeks to impose its own network architecture on Cox and the other CLECs in Virginia. Verizon misstates the testimony, the law and even its own positions to support these efforts. As

¹ Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, Petition of Cox Virginia Telcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration, Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc., *Memorandum Opinion and Order*, CC Docket Nos. 00-218, 00-249, 00-251, DA No. 02-0731 (Wireline Comp. Bur.) (rel. July 17, 2002) (the "*Arbitration Order*").

shown below, accurate readings of the testimony and the law support the Commission's original decisions on each issue for which Verizon asks reconsideration.

While there are ample substantive reasons to deny reconsideration, the Commission also can deny several requests because they are raised for the first time in the Petition. As described in more detail in Cox's Motion to Strike, filed concurrently with this Opposition, several of the issues in the Petition relate to matters that should have been raised in Verizon's response to Cox's petition for arbitration, in testimony or, at the latest, in the briefs.² Verizon's failure to raise these issues during the fifteen months between the initiation of this proceeding and the *Arbitration Order* plainly constitutes waiver of those claims. The Commission should not allow Verizon yet another bite at the apple.

Further, the Commission should ignore the five-page introductory section of the Petition, except to the extent that it seeks reconsideration of specific issues.³ This introduction does not request any specific relief, but merely states a view of how Verizon thinks the proceeding should have been conducted. Moreover, the introduction demonstrates that Verizon seriously misunderstands the Commission's role in this proceeding. While the Commission correctly concluded that it would not adopt contractual provisions that violated existing rules, the Commission never indicated that it would abdicate its role when called upon to fill gaps not addressed by existing regulations.⁴ Verizon's theory that it should be held to the minimum requirements of the rules, and nothing more, is contrary to the Commission's own rulings on

² See Motion to Strike Declaration of William Munsell and Other Inappropriate New Matter, filed Sept. 10, 2002 (the "Motion to Strike") at 8-10 (discussing new issues raised in the Petition).

³ Petition at 1-5.

⁴ Prehearing Conference, July 10, 2001, Tr. at 13 (Dorothy Attwood) ("We will look at the existing state of the law and apply that state of the law.")

how states should conduct arbitrations. Indeed, the Commission has recognized that state commissions may be required to consider matters that are “beyond the rules the Commission has established[.]”⁵ Thus, the Commission should reject Verizon’s approach as contrary to the basic principles of interconnection arbitrations.

II. The Commission Properly Determined that Verizon Should Not Be Permitted to Determine Whether Cox Uses Tandem or End Office Interconnection [Issue I-4].

The Petition’s discussion of Issue I-4 continues Verizon’s effort to require CLECs to conform their networks to Verizon’s legacy architecture. There is no basis in the rules or the statute for any such requirement and the Commission has ruled to the contrary repeatedly.

Verizon makes four basic claims in the petition: (1) that Cox’s language improperly imposes engineering standards on Verizon; (2) that direct trunking does not affect points of interconnection; (3) that the evidence supports Verizon’s position; and (4) that the Commission’s decision somehow requires Verizon to provide “superior quality” interconnection to CLECs. Each of these claims is wrong.

First, Verizon argues that Cox’s language imposes Cox’s engineering standards on Verizon.⁶ As a threshold matter, the Commission should not consider this claim because Verizon failed to raise it during any of the multiple opportunities earlier in this proceeding. Indeed, the language that Verizon now finds objectionable was included in Cox’s very first filing and in every subsequent filing of contractual language, so Verizon hardly can claim to have been surprised by it. Consequently, Verizon has waived any right it had to object.

⁵ See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 16499, 16565-6 (1996) (“*Local Competition Order*”) (recognizing that “state commissions may be called upon to define specific terms and conditions . . . beyond the rules the Commission establishes . . .”)

⁶ Petition at 6 n.12.

There also is no substantive basis for Verizon's objection. With the exception of the specific threshold used, the language Cox proposed closely parallels language in Verizon's proposed agreement, and the bilateral obligation to establish trunk groups thus would have been essentially the same under either agreement.⁷ In other words, the parties agreed as to the nature of the obligation to establish new trunks; they disagreed only as to the threshold for doing so. This was not a matter of one party "dictating" to the other, but of the parties agreeing on an engineering principle.⁸ Consequently, there is no reason for Verizon's objection.

Even if there were a difference between the parties' language, Verizon's theory that an interconnection agreement cannot be used to set engineering standards as between the parties would be wrong. Almost all interconnection agreements set standards for the parties' interactions, in areas ranging from blocking to the format of billing records. These standards can be very specific, and in many cases have been backed up by penalties when they are not met. Where parties disagree on the specific standards, it is the arbitrator's role to address that disagreement, which is precisely what the Commission has done here.

⁷ The language proposed by Verizon was as follows: "In the event the traffic volume between a Verizon End Office and the Cox POI, which is carried by a Final Tandem Local Interconnection Trunk group, exceeds the CCS busy hour equivalent of one (1) DS-1 at any time and/or 200,000 combined minutes of use for a single month, *the originating Party shall promptly establish new End Office One-Way Local Interconnection Trunk groups between the Verizon End Office and the POI.*" Verizon Proposed Contract, filed Nov. 14, 2001 ("Verizon November Agreement"), § 5.2.4 (emphasis supplied). The language adopted in the *Arbitration Order* is: "In the event the one-way Tandem-routed traffic volume between any two Cox and Verizon Central Office Switches at any time exceeds the CCS busy hour equivalent of three DS-1s for any three (3) months in any consecutive six (6) month period or for any consecutive three (3) months, *the originating Party will establish new one-way direct trunk groups to the applicable End Office(s) consistent with the grade of service parameters set forth in Section 5.5.*" Cox Proposed Contract, filed Nov. 14, 2001 ("Cox November Agreement"), § 5.2.4 (emphasis supplied).

⁸ Indeed, there is nothing in the Cox language that would prevent Verizon from implementing the obligations it would have imposed on itself under its proposed language. The Cox language merely sets a higher threshold for when a party is required to establish a new trunk, and would allow Verizon to establish its own direct trunks at the one DS-1 level or even at a lower threshold.

Verizon's second claim is that the Commission applied the wrong legal standard because direct trunking does not affect physical points of interconnection.⁹ Verizon's theory is that, because the physical point of interconnection might not be changed by direct trunking, it is not required to show that the interconnection requested by Cox is technically infeasible. This is an insupportable reading of the *Local Competition Order* and Section 251 of the Communications Act.¹⁰ The statute and the rules do not refer to physical points of interconnection, but merely to "interconnection."¹¹ In fact, as Verizon acknowledges, the Commission has held that the physical location of the interface between the facilities of two carriers and the point of interconnection may be different, such as in meet point arrangements.¹² Similarly, nothing prevents a CLEC from purchasing transport from an ILEC or another carrier between its physical network and a point of interconnection. Thus, interconnection is not just a matter of physical interfaces between facilities, but of network architecture and the point where legal responsibility for traffic shifts.

Verizon's legal argument also is confounded by its own factual claims. Simply put, if shifting traffic from tandem to end office trunks had no effect on interconnection, there would be no reason for Verizon to insist on end office trunking. Verizon, however, claims that direct end office trunking will reduce the load on its tandems, which could occur only if the point of interconnection between the CLEC networks and Verizon shifted from the tandem to the end office. The facts also show that forcing CLECs to implement direct trunking at the one DS-1

⁹ Petition at 7-8.

¹⁰ *Local Competition Order*, 11 FCC Rcd at 15606.

¹¹ 47 U.S.C. § 251(c)(2); 47 C.F.R. 51.305(a).

¹² *Local Competition Order*, 11 FCC Rcd at 15780 (concluding that "the 'point' of interconnection for purposes of sections 251(c)(2) and 251(c)(3)" is at the ILEC's switch in meet point arrangements); *see also* Petition at 2 n.4 (quoting *Local Competition Order*).

level would have significant effects on CLEC costs for interconnection.¹³ Taken together, these facts confirm that Verizon's reading of the *Local Competition Order* is wrong. Since Verizon has made no effort to show that tandem interconnection on Cox's terms is technically infeasible, Verizon's language cannot be adopted.

Even if the clear and convincing evidence standard did not apply, Verizon's notion that "the clear weight of the evidence" supports its one DS-1 threshold for direct trunking is utterly wrong.¹⁴ While touting CLEC trunk growth rates, Verizon ignores that it never demonstrated any link between CLEC growth and tandem exhaust, or even showed an increase in the rate of tandem exhaust since CLECs began providing service.¹⁵ Verizon, while dismissing the evidence that CLECs account for only a small fraction of tandem trunks, does not acknowledge that CMRS providers, interexchange carriers and other ILECs account for nearly twice as many trunks as CLECs, an important element in the Commission's decision.¹⁶ Similarly, the argument that the statistics provided by Cox are only a "snapshot" neglects to mention that those statistics cover a two-year period.¹⁷ At the same time, Verizon never provided any engineering basis for implementing direct trunking at the DS-1 level, instead relying on a practice so old that

¹³ These differences also suggest another reason that Verizon's engineering practices should not be used as a touchstone for CLEC trunking decisions. In Verizon's case, implementing direct trunking at the DS-1 level is essentially costless, as the only expense Verizon incurs is to change the destinations of calls travelling over existing trunks. A CLEC, however, not only would have to change the destinations of calls, but also would have to pay for the trunks or construct its own facilities to connect directly to the end office.

¹⁴ Petition at 8-9.

¹⁵ See Cox Initial Brief at 24 & n.93 (comparing tandem growth to overall traffic growth for Verizon network). As Cox noted in its initial brief, while Verizon's witness argued that this comparison was incorrect, it was based entirely on his testimony and Verizon did not provide any data to contradict this showing despite an invitation from the staff to do so. Tr. at 1283-86. Verizon also does not provide any counter to Cox's showing that CLEC growth rates are deceptive because CLECs constitute a small portion of Verizon's traffic or to the likelihood that CLEC growth rates will level off given the current state of the telecommunications market. Cox Initial Brief at 25 n.95.

¹⁶ *Arbitration Order*, ¶ 89; see also Cox Exhibit 12 (proportion of trunks from each category of carrier).

¹⁷ Compare Petition at 9 with Cox Exhibit 12.

Verizon's own witness could not identify any engineering study to support it.¹⁸ In contrast, the petitioners provided evidence concerning current engineering standards, all of which contradicted Verizon's DS-1 threshold.¹⁹ All of this evidence weighs heavily against Verizon's arguments.

Verizon also does not respond to the evidence showing that it can address tandem exhaust issues without imposing a DS-1 threshold on its CLEC competitors. Most significantly, Verizon can implement direct trunking for outbound traffic from its switches. Since, as Verizon acknowledges, it originates more traffic to CLECs than it receives from them, more direct trunking from Verizon's end offices should have a significant effect on tandem exhaust.²⁰ Verizon also could reduce the need for new tandems by reducing the number of underutilized trunks, as described during the hearing.²¹ Cox's compromise that sets the direct trunking threshold at three DS-1s will reduce the need for future tandem expansion further.²² Thus, the evidence on both the need for conservation of tandem resources and the steps Verizon can take to avoid tandem exhaust supports the Commission's decision under any evidentiary standard that could apply.

¹⁸ Tr. at 1186-87 (Albert) (acknowledging that standards were set decades ago and that Verizon could not locate the studies used to support them).

¹⁹ Cox Initial Brief at 26 & n.100, citing Direct Testimony of Francis R. Collins, Ph.D., filed July 31, 2001 (the "Collins Direct Testimony") at 15-16, Tr. at 1427-28 (Talbot) (describing modern engineering standards).

²⁰ Petition at 7-8. Under negotiated language in the Cox Agreement, Verizon can implement direct trunking for its outbound traffic through the joint grooming process or on its own initiative. *See* Cox Agreement, §§ 10.1 (joint grooming process), 10.3 (Verizon-initiated direct trunking).

²¹ Tr. at 1526-27 (Albert).

²² Verizon's concerns that CLECs lack incentives to shift from tandem interconnection can be laid at its own feet. Verizon had the opportunity in the hearing to argue for different tandem and end office rates for ISP-bound traffic, but chose not to do so. Tr. at 1776-8 (Pitterle) (agreeing that ISP-bound traffic provisions should use one rate for tandem and end office).

Verizon's third argument is that the Commission's decision not to adopt the one DS-1 threshold means that CLECs are obtaining "superior quality" interconnection.²³ This is wrong as a matter of law and fact. Cox already has shown that, contrary to Verizon's claim, "superior quality" refers to blocking and other characteristics of transmission, not to locations of interconnection.²⁴ It does not refer to points of interconnection; indeed it could not, since the statute gives CLECs the right to interconnect with ILECs at any technically feasible point.²⁵ Even if, as a theoretical matter, there were a question of whether Cox were obtaining "superior quality" interconnection, Verizon voluntarily provides unlimited tandem interconnection to other ILECs, to interexchange carriers and to CMRS providers.²⁶ Under Section 251(c)(2)(D) of the Communications Act, Verizon may not discriminate in favor of these other carriers and against CLECs and, consequently, may not impose a one DS-1 threshold on CLECs while it imposes no threshold on other carriers.²⁷

Finally, Verizon errs when it claims that it cannot recover its costs because its "rates are limited by Commission rules to the costs of an efficient network."²⁸ The rules, in fact, base cost calculations on an ILEC's existing network configuration, not the more efficient CLEC network

²³ Petition at 8.

²⁴ See Cox Reply Brief at 17 & n.63; *Local Competition Order*, 11 FCC Rcd at 15614-15 ("probability of blocking in peak hours and transmission standards" are among the factors in determining whether interconnection is "equal in quality"). Verizon's claim that it implements new tandems to avoid blocking misses the point. Petition at 8. Verizon does not and cannot claim that CLEC trunks experience less blocking than Verizon's trunks (or other carriers' trunks) as a tandem approaches its capacity. Indeed, a CLEC actually may experience more blocking (and therefore, lower quality under Verizon's theory) than Verizon if it chooses to interconnect at a tandem that is operating at or near capacity rather than implementing direct trunking.

²⁵ 47 U.S.C. § 251(c)(2).

²⁶ Tr. at 1276 (Albert).

²⁷ 47 U.S.C. § 251(c)(2)(D). See Cox Reply Brief at 16-17 & n.62 (applying Verizon's standards to CLECs would be unlawfully discriminatory).

²⁸ Petition at 6.

design.²⁹ If Verizon adds tandems to meet increases in traffic, the costs of doing so can be considered in determining TELRIC rates.³⁰

In sum, the Commission's original determination was correct and, equally important, is fully supported by facts that Verizon does not challenge. There is no basis for overturning the Commission's decision to adopt Cox's language on direct end office trunking.

III. There Is No Legal or Factual Basis for Overturning the Commission's Determination that Traffic Should Be Rated Based on Originating and Terminating NXX Codes [Issue I-6].

The Petition seeks both "clarification" and outright reversal of the Commission's decision that call rating under the Cox-Verizon interconnection agreement should be based on the NPA-NXX codes assigned to the originating and terminating parties. Verizon's requests for clarification are unnecessary, and actually would obfuscate the issues. Verizon's request for reconsideration is based on an untenable reading of the Commission's case law, on an irrelevant and untimely declaration and on willful ignorance of the testimony in this proceeding. All of Verizon's requests should be denied.

A. There Is No Reason for the Commission to Clarify the Interaction Between the Arbitration Order and Other Commission Decisions.

Verizon seeks clarification of the effect of the *Arbitration Order* on two cases – the *ISP Traffic Remand Order* and the *Mountain Communications* decisions.³¹ There is, however, no conflict between either of these decisions and the *Arbitration Order* and there is nothing to clarify.

²⁹ 47 C.F.R. § 51.505(b)(1); see also *Local Competition Order*, 11 FCC Rcd at 15850 (basing costs on "the incumbent LEC's existing wire center locations," rather than a hypothetical network structure).

³⁰ See Cox Initial Brief at 24 n.91.

³¹ Petition at 15-23.

First, Verizon claims to be concerned that the *Arbitration Order* somehow overrules the *ISP Traffic Remand Order*.³² This plainly has not occurred, and nothing in the *Arbitration Order* even suggests such a result. Among other things, the *Arbitration Order* specifically recognizes the applicability of the *ISP Traffic Remand Order* when it addresses Issue I-5.³³ Equally significantly, the discussion of Issue I-6 makes it clear that the Commission is addressing only the question of whether “a call passing between [two] networks is subject to reciprocal compensation . . . or access charges”³⁴ This issue arises, under the current regime, only as to non-ISP traffic. Finally, any possible doubt is resolved by the actual language approved by the Commission, which specifically excludes ISP-bound traffic from the definition of “Local Traffic.”³⁵ Thus, there is no reason to clarify the interaction between the *ISP Traffic Remand Order* and the *Arbitration Order*.

There also is no reason to address Verizon’s claimed conflict between the *Arbitration Order* and the *Mountain Communications* decisions.³⁶ The issue considered in those decisions has nothing to do with the intercarrier compensation issues addressed in the *Arbitration Order*. In fact, the *Mountain Communications* decisions do not address reciprocal compensation or the question of what constitutes a local call at all, except to note that the determination of whether a call is toll or local is based on the location where a telephone number “is assigned.”³⁷

³² *Id.* at 15-16.

³³ See, e.g., *Arbitration Order*, ¶ 245-46.

³⁴ *Id.*, ¶ 286.

³⁵ Cox November Agreement, § 1.39. The agreement filed with the Commission on September 3, 2002 by Cox and Verizon replaces the term “Local Traffic” with the term “Reciprocal Compensation Traffic,” to reflect a change suggested by Verizon. This term also is defined to exclude ISP-bound traffic. See Cox Agreement, § 1.60.

³⁶ Petition at 16-18.

³⁷ *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, *Memorandum Opinion and Order*, 17 FCC Rcd 2091, 2096 (Enf. Bur. 2002) (“*Mountain Communications Initial Order*”), *affirmed*, *Order on Review*, FCC 02-220, rel. July 25, 2002 (“*Mountain Communications Review Order*”).

The *Mountain Communications* decisions concern a specific paging issue, which is the desire of paging companies to minimize the toll charges experienced by people paging their customers. Many paging companies enter into "reverse toll billing" arrangements, under which they pay the toll charges that end users normally would pay to call numbers that are assigned to distant rating points. Mountain Communications chose to address this issue by using direct inward dialing ("DID") numbers from Qwest's NXX codes.³⁸ In practice, interconnection with these numbers always occurs at the end office where they are assigned.³⁹ Mountain Communications, therefore, had to obtain transport from various Qwest end offices to its facilities. The Commission correctly concluded that Mountain Communications was required to pay Qwest for these facilities.

The *Mountain Communications* cases can be understood only in the context of the Commission's decision in *TSR Wireless*, a case that Verizon ignores.⁴⁰ In that decision, the Commission held that an ILEC was not entitled to charge a paging company for transport to a single point of interconnection *and* that paging companies were entitled to reciprocal compensation regardless of whether the physical point of interconnection was in the same local calling area as the rating point for the NXX.⁴¹ This result, of course, is consistent with several elements of the *Arbitration Order*, including the decision on this issue and the decision on Issue

³⁸ While the *Mountain Communications* decisions refer to a "single point of interconnection," the use of DID lines necessarily involves handoff of responsibility for any call from the ILEC to the paging company at the end office because DID is a form of line side interconnection. Once the call is handed off, it becomes the paging company's responsibility to complete the call and, hence, the ILEC can charge for the facilities the paging company uses to transport traffic from the end office to the paging facilities.

³⁹ In a number portability environment, it is possible that a paging company could relocate the point of interconnection for DID numbers to its paging facilities. However, paging companies have not implemented number portability, so in practice a DID number must be interconnected at the ILEC switch.

⁴⁰ *TSR Wireless, LLC v. U S West Communications, Inc.*, *Memorandum Opinion and Order*, 15 FCC Rcd 11166 (2000) ("*TSR Wireless*"), *aff'd sub. nom. Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

⁴¹ *TSR Wireless*, 15 FCC Rcd at 11176.

I-1. Moreover, the *TSR Wireless* order makes it clear that the wide area calling issues addressed in *Mountain Communications* relate entirely to end user charges, not to intercarrier compensation.⁴²

In other words, and contrary to Verizon's assertion, there are decisionally-significant differences between the arrangements at issue in the *Mountain Communications* decisions and in this proceeding. These differences are both physical and legal. No CLEC uses DID interconnection, so there is no useful analogy to the interconnection arrangements addressed in the *Mountain Communications* decisions. As a matter of law, the *Mountain Communications* decisions do not address intercarrier compensation at all, and therefore provide no guidance as to the issues in this proceeding. Consequently, there is no conflict for the Commission to resolve.

B. The Commission Correctly Determined that Call Rating Should Be Based on Comparison of NXX Codes.

Not content to seek unnecessary clarifications, Verizon next mounts a direct attack on the Commission's determination that calls should be rated based on the originating and terminating NXX codes, instead of Verizon's vague and unworkable language requiring analysis of "the originating and terminating points of the complete end-to-end communication." Verizon's legal arguments are without merit and Verizon's untimely, uncross-examined declaration does not address the key factual flaws in its contract language. Because nothing has changed, there is no reason for the Commission to reexamine its original conclusions.

⁴² *Id.* at 11184 ("Section 51.703(b) concerns how carriers must compensate each other for the transport and termination of calls. It does not address the charges that carriers may impose upon their end users.")

1. There Is No Legal Basis for Reconsideration.

Verizon's legal argument has five prongs. First, it relies on its erroneous analysis of the *Mountain Communications* decisions.⁴³ For the reasons described above, there is no conflict between the *Arbitration Order* and those decisions and, therefore, they provide no basis for reconsideration.

Verizon next argues that the Commission's rules, in light of Section 251(g) of the Communications Act, require that so-called "virtual" foreign exchange ("FX") traffic not be treated as local traffic.⁴⁴ This theory is contradicted by the Court of Appeals decision on the *ISP Traffic Remand Order*, which rejected an expansive view of Section 251(g).⁴⁵ In this context, it is important to note that before the 1996 Act, foreign exchange traffic typically was treated as local. Moreover, Verizon's argument assumes a key conclusion – that virtual FX traffic is, in fact, toll traffic – without citing a single case or even a single line of testimony to support that claim. In fact, the testimony demonstrates that Verizon does not consider traditional FX traffic to be toll traffic, as it believes that reciprocal compensation applies to such traffic.⁴⁶ Consequently, there is no basis for Verizon's assumptions.

Next, Verizon argues that the *Arbitration Order* is inconsistent with Commission policies intended to prevent "market distortions." At base, this argument is merely a plea for the Commission to abandon its conclusion that it would not decide other proceedings in this case, and can be dismissed for that reason alone.⁴⁷ At the same time, Verizon provides no evidence

⁴³ Petition at 18.

⁴⁴ *Id.* at 18-19.

⁴⁵ *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432-33 (D.C. Cir. 2002).

⁴⁶ Tr. at 1816-18 (Pitterle).

⁴⁷ The basic compensation issues are part of the Commission's pending *Inter-carrier Compensation* proceeding. See *Arbitration Order*, ¶ 54.

that any market distortions will arise from the decision. For instance, Verizon's costs for transporting traffic are essentially unaffected, regardless of how the Commission decides this issue.⁴⁸ In addition, Verizon's own witness admitted that it would be inefficient to require CLECs to have a physical presence in every Verizon local calling area.⁴⁹ Thus, requiring CLECs to modify their networks to eliminate virtual FX would introduce the very distortions that Verizon says should be prevented.⁵⁰ Finally, there is no evidence that Verizon would collect the supposed "lost" revenues or avoid reciprocal compensation payments if it prevailed on this issue. In fact, it is equally reasonable to believe that CLECs would stop offering the service or would modify their networks to avoid claims that traffic fell into the category of "virtual FX."

Fourth, Verizon argues that the *Arbitration Order* conflicts with *Bell Atlantic-Pennsylvania*.⁵¹ Of course, that decision relates to interstate, interLATA traffic, which is not at issue here. Thus, there is no conflict. Moreover, Verizon's argument does not address its own conclusion that traditional FX traffic should be treated as local. In any event, the Commission should disregard this argument because Verizon failed to make it in the initial phase of this proceeding.⁵²

⁴⁸ See Cox Initial Brief at 36-37; Tr. at 1238-39 (Albert) (Verizon experiences little or no incremental cost in transporting traffic to Cox point of interconnection).

⁴⁹ Tr. at 1822-23, 1825 (Pitterle); see also Cox Initial Brief at 36-37.

⁵⁰ Verizon, of course, is not entitled to pick the economic distortions it believes should be introduced into the systems. One of the purposes of the Telecommunications Act of 1996 was to encourage the development of efficient network arrangements for the benefit of consumers of telecommunications service. Any rule that requires CLECs to duplicate ILEC network architecture merely to protect ILEC revenues would be contrary to those goals.

⁵¹ Petition at 20-21, citing *AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556, 587 (1998) ("*Bell Atlantic-Pennsylvania*"), recon. denied 15 FCC Rcd 7467 (2000).

⁵² In this regard, it is ironic that Verizon complains that the Commission ignored *Bell Atlantic-Pennsylvania*, when Verizon did not choose to mention it before.

Finally, Verizon asks the Commission to rely on various state decisions that might support its position.⁵³ As described in Cox's initial brief, the Commission should not rely on state decisions, especially in areas that require interpretation of the Commission's rules and policies, as the Commission is in a better position to make such determinations.⁵⁴ Even if the Commission were to consider looking to the states, Verizon continues its habit of selectively citing only the decisions that it prefers and ignoring the many state decisions that disagree with its position.⁵⁵ Equally significant, the state decisions demonstrate that, to the extent there is an abuse in the assignment of NXX codes, the states are well-positioned to address such abuses, something that cannot be said of the blunt instrument of Verizon's proposed contract language.⁵⁶ This is a fact that Verizon has not even attempted to refute.

2. Verizon's Proposed Contract Language Cannot Be Implemented.

Verizon's core factual assertion is that the Commission erred in determining that there is no practical solution for rating calls other than comparing NPA-NXX calls.⁵⁷ This claim is based on a declaration appended to the Petition, which makes new factual claims more than ten months after the hearings and more than eight months after briefing was completed.⁵⁸ For the reasons described in Cox's Motion to Strike, this declaration should be struck as egregiously untimely.⁵⁹ Even if it is not struck, it should be accorded no weight at all and fails to address the specific issues raised by Verizon's proposed language.

⁵³ Petition at 21.

⁵⁴ Cox Initial Brief at 4, 7.

⁵⁵ *See, e.g.,* Brief of WorldCom, Inc. at 85-86.

⁵⁶ Cox Initial Brief at 29.

⁵⁷ Petition at 21-23.

⁵⁸ Petition, Declaration of William Munsell (the "Munsell Declaration").

⁵⁹ Motion to Strike at 4-5, 7-8.

First, the Munsell Declaration should be accorded no weight. It provides no indication that Mr. Munsell, who describes himself as employed to represent Verizon in carrier negotiations, is qualified in traffic analysis. He did not conduct the traffic study described in his declaration, but merely supervised it. He does not describe how it was performed, why he concluded it was “accurate” or any of the results. According to the declaration, the study addressed only traditional FX traffic, which Verizon has asserted should be treated as local traffic, and consequently does not address the virtual FX traffic that Verizon seeks to exclude from reciprocal compensation. Similarly, he does not indicate how Verizon would “modify its traffic data collection system” or even how Verizon would know if it had been provided accurate information as to virtual FX traffic by a CLEC. Even without cross examination and discovery, these flaws render the declaration useless.⁶⁰

The absence of cross examination and discovery, however, provides another reason why the Commission should accord no weight to the Munsell Declaration. Cox and the other parties have had no opportunity to test Mr. Munsell’s statements by, for instance, analyzing the methodology of the study or the mechanisms for his proposed modification to Verizon’s data collection systems. This is significant because the Commission has no good way to judge the veracity and usefulness of his claims without having them tested. Indeed, as the hearing demonstrated, cross examination and discovery can have decisional significance.⁶¹ Because Mr. Munsell has not been subject to that scrutiny, the Commission cannot accord his declaration the same weight it gives to the witnesses who were. This is particularly significant because all of the

⁶⁰ It is too late for Verizon to correct these flaws now. Any declaration or other filing that purports to cure the deficiencies of the Munsell Declaration should be struck for many of the same reasons described in the Motion to Strike.

⁶¹ *Arbitration Order*, ¶ 301 (citing cross examination testimony of Steven Pitterle).

witnesses who were subject to cross examination, including several of Verizon's own witnesses, agreed that there is no practical way to rate calls except comparing NPA-NXX codes.⁶²

Even if the Commission were to accord some weight to the Munsell Declaration, it would address only one of the issues raised by Verizon's proposed contract language. While Verizon focuses on virtual FX traffic, there are many other types of traffic, most of which terminate on Verizon's network, for which it is impossible to determine the beginning and end points of "the complete end-to-end communication." This traffic includes calls to leaky PBXs, calls to PBXs with off-premises extensions and calls to local area networks.⁶³ The Munsell Declaration does not address any of these forms of traffic and, equally important, does not provide any mechanism that would allow carriers to measure or even estimate the amounts of "toll" traffic generated through such calls. This issue was addressed, however, in prefiled testimony and at the hearing, and all of the witnesses agreed that there was no reliable mechanism for measuring the beginning and end points of all traffic.⁶⁴

The Commission also should recognize that even a determination of the levels of virtual FX traffic is not as simple as the Munsell Declaration and the Petition suggest. While calculation of some factors, such as percentage of local use, percentage of interstate use and the 3:1 ratio for ISP-bound traffic, is relatively uncomplicated, determining levels of virtual FX traffic is much more difficult. The other factors are calculated through purely mechanical measurements of billing records comparing the NXX codes of originating and terminating points.⁶⁵ Determining levels of virtual FX traffic, assuming it could be done, would require

⁶² *Id.*; see also Cox Initial Brief at 27-29.

⁶³ Tr. at 1811-12 (Pitterle).

⁶⁴ See, e.g., *id.*, Collins Direct Testimony at 24-25.

⁶⁵ The 3:1 ratio is even simpler, as it compares total levels of inbound and outbound traffic.

much more manual intervention and cooperation on an ongoing basis. For instance, there would have to be a mechanism for identifying which numbers might qualify as virtual FX out of all of the numbers assigned by a carrier and for providing that information to the other carrier as it changed. This task would be further complicated because other services, such as remote call forwarding, could look very similar to virtual FX traffic and might be difficult to distinguish. The Munsell Declaration does not address these issues at all and the Petition assumes all of these issues away. The Petition even goes so far as to assert that Verizon already has implemented a virtual FX segregation mechanism “in another state,” when the Munsell Declaration only describes a study on traditional FX and asserts that “Verizon is preparing to work with interconnecting CLECs to implement” virtual FX measurement.⁶⁶ In the absence of any real mechanism for implementing Verizon’s proposal to require measurement of the actual originating and terminating points for *all* traffic, the Commission must affirm its conclusion that the Verizon language cannot be adopted.

Finally, the Commission should dismiss Verizon’s latest contract language proposal. Again, for the reasons described in the Motion to Strike, the new language is so untimely that it cannot be considered in this proceeding.⁶⁷ Even if the language could be considered, however, it does not solve the problem identified by the Commission in the *Arbitration Order* because there is no evidence that there is any “reasonable, periodic traffic study or other documented means” that would allow the parties to an agreement to determine the physical origination and termination of all calls. Verizon’s myopic focus on virtual FX traffic is meant to obscure this

⁶⁶ Petition at 22; Munsell Declaration at 2.

⁶⁷ Motion to Strike at 8-9.

flaw in its arguments, but it remains nevertheless, and provides ample justification for the Commission to affirm the *Arbitration Order* on this issue.

IV. The Commission Should Not Modify the Other Provisions Discussed in Verizon's Petition.

Although Verizon does not specifically request reconsideration of other issues relevant to Cox, it does discuss two other provisions of the Cox agreement in the Petition: (a) Section 4.2.2, which concerns points of interconnection; and (b) Section 4.2.3, which addresses certain transport charges. To the extent that Verizon is seeking reconsideration of those portions of the *Arbitration Order* that address these provisions, the Commission should deny those requests.

A. There Is No Reason to Modify the Language in the Cox Agreement Concerning the Location of IPs [Section 4.2.2].

Section 4.2.2 of the Cox-Verizon agreement describes the designation of interconnection points ("IPs") between the parties. It provides, among other things, that "[t]he mutually-agreed IPs on the Cox network from which Cox will provide transport and termination of traffic to its Customers shall be designated as the Cox Interconnection Points. . . ." ⁶⁸ Verizon objects to this language because it claims that, under the Commission's rules, all interconnection points must be on the ILEC's network. ⁶⁹ Verizon misconstrues the Commission's rules and the language of the agreement.

First, there is nothing in the Commission's rules that forbids the establishment of IPs on a CLEC's network. Section 51.305(a)(2) of the rules describes the minimum obligations of an ILEC. It is not a limitation on where interconnection can take place under an agreement.

⁶⁸ Cox Agreement, § 4.2.2.

⁶⁹ Petition at 4.

Consequently, the Commission's decision to adopt this language is not in conflict with any rule.

Instead, as described above, it merely fills one of the inevitable gaps that the rules do not cover.⁷⁰

Second, if Verizon had objections to this language, it should have raised them in the hearing or its briefs, rather than waiting until reconsideration. Indeed, Verizon's own position on Issue I-3 was that it should be allowed to establish IPs on Cox's network, and this new claim is inconsistent with that position.

Finally, even if Verizon were correct as to the meaning of Section 51.305, there would be no basis for any relief. Verizon asks for the Commission to clarify that the IPs must be set by "mutual agreement," but that is exactly what the Cox language already says, so there is nothing to change.⁷¹ In fact, the parties already have agreed on the Cox IPs, which are reflected in an exhibit to the Cox Agreement and were in place even before the agreement was negotiated. Consequently, there is absolutely no need for any clarification or reconsideration.

B. Verizon Should Not Be Permitted to Evade Charges for Transport on Cox's Network [Section 4.2.3].

Verizon also argues that Section 4.2.3 of the Cox Agreement violates Section 51.701(c) of the Commission's Rules.⁷² This claim, buried in a footnote, does not appear to be an actual request for reconsideration. Even if it is treated as such a request, however, it should be denied.

As a threshold matter, this was not a disputed issue in the arbitration. Verizon failed to make any argument that Section 4.2.3 violated the Commission's Rules during the initial phase of the proceeding. This, perhaps, is because the requirement that Verizon now finds offensive

⁷⁰ See *supra* Section I.

⁷¹ Compare Petition at 4 with Cox Agreement, § 4.2.2.

⁷² Petition at 5 n.10.

appeared in *both* the Cox and Verizon versions of this provision.⁷³ Thus, this is a voluntarily-negotiated provision and cannot be subject to reconsideration.

Even if this provision were not voluntarily negotiated, Verizon would be entitled to no relief. The rate symmetry rule does not require that charges be identical, but only that the rates be the same.⁷⁴ Verizon does not allege that Cox is charging different rates than Verizon, only that the overall charges might differ. Further, Section 51.701(c) of the Commission's rules, which Verizon cites, addresses only transmission between an IP and the end office, not transmission between the POI and the IP when the two are at different locations.⁷⁵ The language of Section 4.2.3 fills that gap. Indeed, since it addresses only transmission between the POI and the IP, it plainly cannot conflict with Section 51.701(c). Thus, there is no basis for Verizon's claim.

⁷³ In fact, the entire provision is the same in both the Cox and Verizon proposed agreements. *Compare* Cox November Agreement, § 4.2.3 *with* Verizon November Agreement, § 4.2.3.

⁷⁴ 47 C.F.R. § 51.711(a)(1).

⁷⁵ 47 C.F.R. § 51.701(c) (defining "transport" as transmission and any necessary tandem switching "from the interconnection point . . . to the terminating carrier's end office switch . . .").

V. Conclusion

For all these reasons, Cox Virginia Telcom, Inc., respectfully requests that the Commission deny Verizon's Petition for Reconsideration and Clarification and affirm those elements of the *Arbitration Order* challenged by Verizon.

Respectfully submitted,

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September 10, 2002

CERTIFICATE OF SERVICE

I, Vicki Lynne Lytle, a legal secretary at Dow, Lohnes & Albertson, PLLC do hereby certify that on this 10th day of September, 2002, copies of the foregoing Opposition of Cox Virginia Telcom, Inc. were served as follows:

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